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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 967

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

EVERD S. BOYER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois, entered in the above entitled case on September 29, 1967.

OPINIONS BELOW.

The first opinion of the Illinois Appellate Court, First District, Second Division, is reported at 34 Ill. App. 2d 330, 181 N. E. 2d 359 (1962) and is printed in Appendix A; the second opinion of the Appellate Court in this case is reported at 70 Ill. App. 2d 214, 217 N. E. 2d 303 (1966), and is printed in Appendix B. The opinion of the Supreme Court of Illinois is reported at 38 Ill. 2d 31, 230 N. E. 2d 173 (1967), and is printed as Appendix C.

JURISDICTION.

The judgment of the Supreme Court of Illinois was entered on September 29, 1967; time for rehearing before that Court expired on October 20, 1967. The jurisdiction of the Court is invoked under 28 U. S. C., Section 1257(3). Federal questions sought to be reviewed by the Court were timely and properly raised in the State courts.

QUESTIONS PRESENTED.

1. Whether Section 2 of the Federal Safety Appliance Acts (45 U. S. C. § 2), a penal statute, created a federal, strict liability cause of action for the benefit of the general public.

2. Whether a railroad may exculpate itself by release provisions in a free interstate pass, pursuant to the Hepburn Act (49 U. S. C. § 1(7)), from liability to a free pass-rider injured as a result of a violation of Section 2 of the Federal Safety Appliance Acts.

3. Whether the public policy of Illinois in imposing strict liability for the violation of a penal statute should be subordinated to the federal policy of the Hepburn Act (49 U. S. C. § 1(7)) which upholds the validity of release provisions in free interstate railroad passes.

STATUTES INVOLVED.

The statutory provisions involved are the Federal Safety Appliance Act, 45 U. S. C. §§ 1-2, and the Hepburn Act, 49 U. S. C. § 1(7). These are printed in Appendices D and E.

STATEMENT.

Plaintiff, Everd S. Boyer, initiated suit in the Superior Court of Cook County, Illinois, against defendant The Atchison, Topeka and Santa Fe Railway Company for personal injuries sustained while he was a free-pass-rider on defendant's train. A judgment was entered on the pleadings (Abst. 15) in favor of defendant on its affirmative defense, based on the Hepburn Act, 49 U. S. C. § 1(7), of assumption of the risk as evidenced by plaintiff's signature at the bottom of an exculpatory clause on the reverse side of his free pass (Abst. 19-21). The exculpatory language on the pass read as follows:

> "This pass is not transferable. It must be signed in ink by the holder named, who, by accepting it, agrees to assume all risk of accident and damage to person or baggage in any circumstances, whether caused by the negligence of servants or otherwise. The holder agrees not to use this pass in violation of any law, and certifies that he is entitled by law to use it. To be forfeited if presented by any person." (Abst. 6-7, 67.)

Plaintiff, in an attempt to state a cause of action and remove the bar of the affirmative defense, amended his reply and answer to a motion for judgment on the pleadings, to allege that the Federal Safety Appliance Act created a cause of action for plaintiff and that the contract and conditions embodied in the pass were invalid as contrary to the public policy of the federal statute and the State of Illinois (Abst. 16-18). The trial court dismissed the complaint. Plaintiff appealed to the Illinois Appellate Court, which reversed the trial court and remanded the case for trial. Plaintiff moved for summary judgment at trial, and this was granted on May 7, 1965 (Abst. 48), over defendant's contention that the Federal Safety Appliance Acts did not create, in themselves, a cause of action, and that the release

provisions of the exculpatory clause constituted a complete defense pursuant to the Hepburn Act, 49 U. S. C. § 1(7) (Abst. 73-74). Defendant then appealed a judgment of $9,500 to the Appellate Court, again asserting the defense of the Hepburn Act. That Court affirmed on the basis of its first opinion. A certificate of importance was issued to the Illinois Supreme Court on the ground that the cause involved questions of such importance that it should be passed upon by the Supreme Court of Illinois. The Illinois Supreme Court held that the violation of the Federal Safety Appliance Act created a strict-liability civil cause of action, based upon the supposed construction of the Act by the United States Supreme Court and other federal courts. In regard to the release provisions in the free pass signed by plaintiff, the Court held that a violation of the Federal Safety Appliance Act results in absolute liability in favor of all members of the public to which the policy of the Hepburn Act must yield.

REASONS FOR GRANTING THE WRIT.

The Court below held that Section 2 of the Federal Safety Appliance Acts created a strict-liability, civil cause of action for injuries sustained by a railroad passenger as a result of a violation of that Act. A sweeping enlargement of the liability exposure of American railroads is thereby threatened. A heretofore penal statute, if the Court below is correct, would hereafter provide the basis for a federal, absolute-liability cause of action in all civil cases where a breach of the act and a resultant injury are proven. The defendant's negligence or freedom from negligence would be immaterial. The class privileged in this manner would include passengers, motorists involved in crossing accidents, business visitors, and all other members of the public injured as a result of the Acts' violation—whether the defendant was negligence in causing these injuries or not.

The Court below, in arriving at this new interpretation of the Safety Appliance Act, cited, as the basis for its holding, numerous decisions of the Supreme Court of the United States. The cases cited for this principle, however, with one exception, involved a railroad employee suing his employer *under the Federal Employers' Act* for injuries sustained as a result of a breach of a Federal Safety Appliance Act. In relying on these cases to support its holding in this case, the Court below ignored the basic distinction between an action prosecuted by a railroad employee under the Federal Employers' Liability Act, and one instituted under the common law by a person, not an employee, where the violation of a penal statute may be evidence of negligence. The Federal Employers' Liability Act, in Sections 3

and 4 (45 U. S. C. §§ 53, 54), provides the basis for a railroad employee's strict liability cause of action where he is injured as a result of a Safety Appliance violation. This has been carefully explained by the Supreme Court of the United States in a number of opinions. In *Urie* v. *Thompson,* 337 U. S. 163, 188-9, 69 Sup. Ct. 1018 (1948), the Court stated:

> "But by its own terms the Boiler Inspection Act, like the Safety Appliance Acts, does not purport to confer any right of action upon injured employees. It merely makes violation of its prohibition 'unlawful.' Yet it has been held consistently that the Boiler Inspection Act supplements the Federal Employers' Liability Act by imposing on interstate railroads 'an absolute and continuing duty' to provide safe equipment. *Lilly* v. *Grand Trunk R. Co., supra* at 485; *Southern R. Co.* v. *Lunsford,* 297 U. S. 398, 401; cf. *Baltimore & O. R. Co.* v. *Groeger,* 266 U. S. 521, 528-529.
>
> "This conclusion stems, not from any express statutory language, but by implication from §§ 3 and 4 of the Federal Employers' Liability Act, 45 U. S. C. §§ 53, 54, which bar pleadings of, respectively, contributory negligence and assumption of risk 'in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.' But it is § 1 of the Federal Employers' Liability Act, and not §§ 3 and 4, which expressly creates a cause of action for negligence; and by the same token it is § 1 which is the basis of an employee's suit for violation of the Boiler Inspection or Safety Appliance Acts. For where § 1 refers to 'any defect or insufficiency, *due* to *its negligence,* in its cars, engines, appliances,' etc., it clearly is the legislative intent to treat a violation of the Safety Appliance Act as 'negligence,'—what is sometimes called 'negligence *per se.*' *San Antonio & A. P. R. Co.* v. *Wagner,* 241 U. S. 476, 484."

The relationship between the Federal Employers' Liability Act and the Safety Appliance Acts and why *employees* of railroad are beneficiaries of the carriers' strict liability in cases of this kind, was also explained in *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, 524 (1949) and *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430, 434 (1949).

The cases cited by the Court below, then, since they involved actions brought by railroad employees under the Federal Employers' Liability Act, do not support the conclusion that the plaintiff in this case, a railroad passenger, is the beneficiary of a federal strict liability cause of action. One case cited below, *Shields* v. *Atlantic Coast Line Ry. Co.*, 350 U. S. 318 (1955), did not strictly involve a railroad employee. In that case, however, an industry employee was performing the duties of a railroad employee at the time of his injury, and for this reason this Court held he was a member of the class protected by the Safety Appliance Acts. *Shields* v. *Atlantic Coast Line, supra,* at p. 325.

The Court below manifested confusion in attempting to explain the basis for its decision. At one point it stated: "In construing the Federal Safety Appliance Act, we must look to the Federal decisions for its interpretation," *Boyer* v. *A. T. & S. F. Ry. Co.*, 38 Ill. 2d 31, 34 (1967). If federal law is the basis for the Court's holding, it would then logically follow that the decision below turned on the conclusion that a federal cause of action was created by the Safety Appliance Acts. United States District Courts would then be obliged under the holding in *Boyer* to take jurisdiction over cases brought by anyone allegedly injured as a result of a Safety Appliance Act violation. In other words, if the action arises under any of the Safety Appliance Acts—laws of the United States—the district courts would have original jurisdiction of these cases pursuant to

28 U. S. C. § 1331.[1] The Court, below, has in this manner interpreted a federal jurisdictional question to expand the original jurisdiction of the federal courts. It is important to note here that a United States Court of Appeals has decided this issue differently and was affirmed by this Court. In *Jacobsen* v. *N. H. & H. R. Co.*, 206 F. 2d 153 (1st Circ., 1953), the Court stated:

> "Also we think the district court was right in its conclusion that the subject matter of the cause of action stated in plaintiff's amended complaint, invoking the Safety Appliance Acts, 45 U. S. C. A. § 1 *et seq.*, was not within the jurisdiction of the court under 28 U. S. C. § 1331.
>
> "By way of enforcement of the duties imposed by the Safety Appliance Acts, Congress merely imposed a small statutory penalty, to be recovered in a suit brought by the United States; in terms, at least, the Safety Appliance Acts confer no right of action for damages in favor of any individual suffering personal injuries as a result of violation of the various safety provisions."

This decision was affirmed by the United States Supreme Court, 347 U. S. 909 (1954), with the Court citing *Patch* v. *Wabash Railroad*, 207 U. S. 277; *Memphis & Charleston R. Co.* v. *Alabama*, 107 U. S. 581 and *Seany* v. *Boston and Maine Railroad Co.* v. *Alabama*, 197 F. 2d 485.

On the other hand, if the decision below rests on the law and policy of Illinois,[2] then it violates the federal law

1. The pertinent portion reads: "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of $10,000 exclusive of interest and costs, and arises under the constitution, laws, or treaties of the United States."

2. The Court below stated at 38 Ill. 2d 36: "It is, however, settled that the cause of action arising from a breach of the Act is not a Federal cause of action and consequently one in whose favor such a cause of action has arisen must look to the State courts to implement his right of action."

and policy of the Hepburn Act, 49 U. S. C., § 1 (7) and the Supremacy Clause of the United States Constitution. The Hepburn Act has repeatedly been cited by this Court as the basis for upholding the validity of release provisions in free interstate passes. Pursuant to the Supremacy Clause of the United States Constitution, any contrary state policy relating to the validity of the release provisions must yield to the federal law and policy. This Court has repeatedly held the provision for passes in the Hepburn Act constitutes a regulation of interstate commerce and that "free passes in their entirety are taken charge of, not only their permission and use, but the limitations and conditions upon their use." *Kansas City So. R. Co.* v. *Van Zant,* 260 U. S. 459, 468 (1923). To the same effect, holding that release provisions in free interstate passes are valid notwithstanding contrary state policy, are *Charleston and Western Carolina Ry. Co.* v. *Thompson,* 234 U. S. 576, 578 (1914) and *Frances* v. *Southern Pacific Company,* 333 U. S. 445 (1948). The decision below is in conflict with these decisions by the Supreme Court of the United States and a good reason therefore exists for granting this writ.

CONCLUSION.

This case involves questions which are important to the railroad industry. However, beyond the threatened increased liability exposure of American roads, and the possible curtailment of free-pass privileges, the case involves an important question of original federal jurisdiction or a situation where the federal policy of the Hepburn Act was subordinated to the policy of Illinois. In either instance the decision below is contrary to decisions of the Supreme Court of the United States and lower federal courts.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

OPINION OF ILLINOIS APPELLATE COURT.

EVERD S. BOYER, *Plaintiff-Appellant*, v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation, *Defendant-Appellee.*

Gen. No. 48,449.

First District, Second Division.

January 30, 1962.

Rehearing denied February 21, 1962.

MR. JUSTICE BURKE delivered the opinion of the court:

Plaintiff appeals from a judgment on the pleadings. On January 5, 1959, he was traveling as a passenger on defendant's train enroute from Chicago to Los Angeles. He was an employee of another railroad and was riding on this train by virtue of an interstate pass given to him as a courtesy by defendant. The pass, which he signed, stated that he assumed "all risk of damage to person . . . in any circumstances, whether caused by negligence of agents or otherwise." Near Raton, New Mexico, while the train was in motion, the draft gear, a part of the coupling apparatus, broke, due to its defective and inefficient condition, the emergency brakes were automatically applied and due to the rapid and sudden stopping of the train, plaintiff was thrown violently inside the train and sustained injuries. He alleged ordinary care on his part before and at the time of the occurrence. He further alleged that the operation of the train with a defective coupler was a violation of Section 2 of the Federal Safety Appliance Act. The pleadings present the question whether the defendant is

absolved of liability by the provisions of the pass issued under the Hepburn Act.

[1-3] The Hepburn Act, 49 U. S. C. Sec. 1(7), was passed to control abuses in the indiscriminate and uncontrolled issuance of free passes on railroads. The Act deals only with the classes of persons to whom passes may be issued and contains nothing about the liability of carriers to their passengers or the terms of the passes. *Kansas City Southern R. Co.* v. *Van Zant,* 260 U. S. 459 (1922); *Francis* v. *Southern Pacific Co.,* 333 U. S. 445 (1947); *Donnelly* v. *Southern Pacific Co.,* 118 P. 2d 465 (1941). The Safety Appliance Act (45 U. S. C. Ch. 1, Secs. 1-37) applies to all trains and cars moving in interstate commerce. In construing the Federal Safety Appliance Act and the Hepburn Act federal law is controlling. *Southern Ry. Co.* v. *R. R. Com. of Indiana,* 236 U. S. 439 (1915); *Herb* v. *Pitcairn,* 306 Ill. App. 583, 29 N. E. 2d 543. Under the automatic coupler provisions of the Federal Safety Appliance Act defendant had an absolute duty to maintain its trains and cars therein with couplers which were in efficient operating condition. A coupler in a train must remain coupled until set free by some purposeful act of control. *O'Donnell* v. *Elgin, J. & E. R. Co.,* 338 U. S. 384, 389 (1949). The federal decisions hold that a passenger who accepts a free pass may exempt a carrier from responsibility for negligence and that in this stipulation no public policy is violated. *Kansas City Southern R. Co.* v. *Van Zant, supra; Francis* v. *Southern Pacific Co., supra.*

Defendant insists that plaintiff's action is grounded on common law negligence, that when the courts speak of absolute liability of the Safety Appliance Act, they mean that evidence of a violation of the Act dispenses with proof that the violation constituted negligence and the courts "equate the violation to negligence per se, or negligence as a matter of law," citing *Moore* v. *Chesapeake & Ohio*

Ry. Co., 291 U. S. 205, 215 (1934); *Urie* v. *Thompson*, 337 U. S. 163, 188 (1949). Defendant says that the Safety Appliance Act nowhere confers any right of action for damages in favor of an individual suffering personal injury as a result of the violation of the various safety provisions and that the only right of a member of the public is to pursue an action conferred by the applicable state law. Defendant concludes that under the Hepburn Act the pass given to plaintiff exculpated defendant from any injury caused by negligence.

[4, 5] In *O'Donnell* v. *Elgin, J. & E. R. Co.*, 338 U. S. 384, the Supreme Court held (390) that "a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence." The *O'Donnell* case was followed by *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430 (1949); and *Affolder* v. *New York Cent. & St. L. R. Co.*, 339 U. S. 96 (1950), wherein the court reiterated the language in the *O'Donnell* case that "a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong." In *Shields* v. *Atlantic Coast Line R. Co.*, 350 U. S. 318 (1956), the Supreme Court held that where a railroad employee was injured by reason of a violation of the Safety Appliance Act, in addition to having a "negligence" action he was entitled to have his case submitted to the jury on the theory of "absolute liability for the violation of the Act." In every decision of the United States Supreme Court since the *O'Donnell* case in 1949, where the question has come before it, the court has consistently held that the violation of the Safety Appliance Act alone and a resultant injury creates a legal cause of action in nowise dependent upon any negligence theory. We find that the plaintiff does not charge the defendant

with common law negligence, but charges it with absolute liability for violation of the Safety Appliance Act. We are of the opinion that the provisions of the pass do not exculpate the defendant for the injury suffered by the violation of Sec. 2 of the Safety Appliance Act.

[6-8] A cause of action, as defined with reference to its elements, consists of a primary right of plaintiff, a corresponding duty of defendant and a wrong by defendant in breach of such right and duty. 1 C. J. S. Actions, Sec. 8(e), p. 984. Subject to the conditions or limitations prescribed by the statute, the violation of a duty imposed by statute gives rise to a cause or right of action in favor of a person the statute was designed to benefit who was injured without any fault on his part. 1 C. J. S., Sec. 9(b), p. 990. See also Sec. 19, Art. II of the Constitution of Illinois. Section 31 of the Civil Practice Act provides that neither names heretofore used to distinguish the different ordinary actions at law, nor formal requisites heretofore appertaining to the manner of pleading in those actions respectively are necessary or appropriate. Under this section a plaintiff is required to set forth the substantial averments of fact necessary to state a cause of action. Supreme Court Rule 13 states that if a breach of statutory duty is alleged the statute shall be cited.

[9-12] We turn to plaintiff's contention that it would be contrary to public policy to allow and permit the defendant to exculpate itself from liability for a violation of the automatic coupler provisions of the Federal Safety Appliance Act by the pass provisions in the case at bar. The basis upon which the courts have refused to permit carriers to exonerate themselves by contract from actions caused by the carrier's wilful and wanton conduct is that it would be contrary to public policy to permit such a defense. The public policy of the United States on the subject of railroad couplers is clear. It is unlawful to operate a rail-

road car without efficient couplers and the duty to equip and maintain cars with secure and efficient couplers is absolute. If the language of the pass could be construed to extend to cases other than negligence cases, the question remains as to whether the Safety Appliance Acts are part of the public policy. One may not by contract immunize himself from civil liability, when to do so would violate public policy. See *Starr* v. *Great Northern R. Co.*, 67 Minn. 18, 69 N. W. 632, 634 (1896); *DeKam* v. *City of Streator*, 316 Ill. 123, 131, 146 N. E. 550; *Foreman* v. *Holsman*, 10 Ill. 2d 551, 554, 141 N. E. 2d 31; *Pitsch* v. *Continental & Commercial Nat. Bank*, 305 Ill. 265, 270, 137 N. E. 198; *Commissioners of Lake Fork Drain. Dist.* v. *People*, 138 Ill. 87, 27 N. E. 857; *People ex rel. Arkansas* v. *Burke*, 212 P. 837, 843; *School District* v. *Teachers Ret. Fund*, 95 P. 2d 720, 723. The pass in the instant case, construed as an attempt to exculpate the railroad from liability for injuries inflicted on the plaintiff as a result of a violation of the Safety Appliance Act, falls within the scope of these cases.

[13] Defendant urges that plaintiff is not entitled to the benefits of Sec. 2 of the Safety Appliance Act since this section was intended for the exclusive benefit of employees or those performing the function of the employees and was not for the benefit of any other members of the general public, and that plaintiff cannot ground his cause of action on this section since he was not a member of the class intended to be protected, citing *St. Louis and San Francisco Ry. Co.* v. *Conarty*, 328 U. S. 243; *Fairport, Painesville & Eastern R. R. Co.* v. *Meredith*, 292 U. S. 589, 594; *Woods* v. *Chicago, B. & Q. R. Co.*, 306 Ill. 217, 221, 137 N. E. 806. We are convinced that these Acts were not enacted for the benefit of railroad employees alone. In *Coray* v. *Southern Pacific Co.*, 335 U. S. 520 (1949), the court said (522): "And this Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to

maintenance or operation of congressionally prohibited defective appliances." See also *Shields* v. *Atlantic Coast Line R. Co.*, 350 U. S. 318; *Baltimore & Ohio R. Co.* v. *Jackson*, 353 U. S. 325, 333. In *United States* v. *Seaboard A. L. R. Co.*, 361 U. S. 78 (1959), the court states the purpose of the Safety Appliance Acts and who they are designed to protect and says (82): "Congress determined the policy that governs us in applying the law. Traditionally, movements of assembled cars for substantial distances involved the hazard of crossing public highways and the tracks of other lines with attendant risks to the public. More important, they involved risks to *those who ride the trains*, particularly the men who operate them." (Italics ours.) In a footnote to this case the court cites testimony before a Congressional Committee having to do with injuries to trainmen and passengers incurred in wrecks caused by a breakage of an air hose or a coupling. It is our view that employees, travelers on the highway and passengers are entitled to the protection of these Acts.

For the reasons stated the judgment is reversed and the cause is remanded for trial.

Judgment reversed and cause remanded for trial.

FRIEND, *P. J.*, and BRYANT, *J.*, concur.

APPENDIX B.

OPINION OF ILLINOIS APPELLATE COURT.

50742

EVERD S. BOYER,
Plaintiff-Appellee,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,
Defendant-Appellant.

Appeal from Circuit Court, Cook County—County Department, Law Division.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

This appeal is taken from a judgment entered on a verdict for plaintiff for personal injuries sustained by him as a passenger on defendant's railroad train. On a prior appeal of this case, a judgment on the pleadings for defendant was reversed and a trial ordered on the merits. (*Boyer* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 34 Ill. App. 2d 330.)

After the case was remanded for trial, and before the trial, defendant amended its answer, alleging that the free pass under which plaintiff was riding was issued to "E. S. Boyer and Wife," whereas the party with whom plaintiff was traveling when injured was his sister, thereby constituting a violation of the Hepburn Act and a revocation of the free pass, and rendering plaintiff a trespasser. 49 U. S. C. §1(7). On plaintiff's motion the amendment was stricken by the trial court.

With the exception of the question relating to plaintiff's violation of the Hepburn Act, defendant admittedly argues the same questions of law on this appeal which were argued

on the former appeal and which were resolved adversely to defendant. The questions of law decided on the former appeal are the law of the case, binding on the trial court and on this court, and we have decided to adhere to our opinion in the former appeal. See *People ex rel. Kastning* v. *Militzer,* 301 Ill. 284; *People ex rel. Powell* v. *Board of Education,* 348 Ill. App. 390.

Plaintiff's violation of the Hepburn Act, in obtaining his sister's passage as his wife, in no way alters his status as an authorized passenger, so as to preclude recovery for his injuries. The most that can be said in this regard is that plaintiff misrepresented his sister's status, which of itself does not render the pass void as to plaintiff. Plaintiff's sister, not plaintiff, was the unauthorized passenger. The cases cited by defendant in support of its position are not in point, for the reason that they involve the alleged unauthorized passenger himself as the party-plaintiff: *T., W. & W. R. R. Co.* v. *Beggs,* 85 Ill. 80, and *Rice* v. *Illinois Central R. R. Co.,* 22 Ill. App. 643. Furthermore, this situation is analogous to cases where an injured employee sues to recover for injuries under the Federal Employers' Liability Act, and the employer defends on the grounds that the employee made misrepresentations at the time of hiring, resulting in no employment. There is no causal relation between the misrepresentations and the injuries. See *Taylor* v. *Elgin, Joliet and Eastern Ry. Co.,* 33 Ill. App. 2d 64.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

APPENDIX C.

OPINION OF ILLINOIS SUPREME COURT.

(No. 40052.—Judgment affirmed.)

EVERD S. BOYER, *Appellee* v. THE ATCHISON, TOPEKA AND SANTA FE RAILROAD CO., *Appellant.*

MR. JUSTICE WARD delivered the opinion of the court:

This appeal by the defendant, the Atchison, Topeka and Santa Fe Railway Company, comes to this court through a certificate of importance issued by the Appellate Court, First District, certifying that questions of law of such importance are involved that they should be passed on by this court. The questions presented are: (1) whether a violation of the Federal Safety Appliance Act, 45 U. S. C. §§ 1 *et seq.*, is in itself an actionable wrong and, if so, is strict liability imposed through such violation; (2) whether the defendant can avoid liability by the exculpatory provision of the pass issued by the defendant to the plaintiff under the Hepburn Act, 49 U. S. C. § 1 (7).

The facts are relatively simple and uncontroverted. On January 5, 1959, the plaintiff was traveling on the defendant's train enroute from Chicago to Los Angeles. The plaintiff was an employee of the Chicago, North Shore and Milwaukee Railroad and as such he was traveling on the defendant's train, not as a fare-paying passenger but as a passenger who had been issued an accommodation or courtesy pass by the defendant. The pass contained the following language: "This pass is not transferable. It must be signed in ink by the holder named, who, by accepting it, agrees to assume all risk of accident and damage to person or baggage in any circumstances, whether caused by the negligence of servants or otherwise. The holder agrees not

to use this pass in violation of any law, and certifies that he is entitled by law to use it. To be forfeited if presented by any other person."

As defendant's train approached Raton, New Mexico, the draft gear, a part of the coupler, broke. The emergency brakes were automatically applied and due to the sudden stopping of the train the plaintiff was thrown to the floor of the train and sustained injuries.

The plaintiff brought an action in the circuit court of Cook County alleging that defendant had violated section 2 of the Federal Safety Appliance Act (45 U. S. C. §2) by operating a train with a defective coupler and alleging that the defendant was therefore absolutely liable to him for the injuries caused by this violation. The defendant's answer stated in part that a violation of section 2 of the Act did not create a cause of action and as an affirmative defense asserted the assumption-of-risk agreement set forth in the pass. The defendant's motion for judgment on the pleadings was granted. On appeal the Appellate Court, First District, reversed and remanded for trial, holding, in effect, that a violation of section 2 of the Federal Safety Appliance Act did create a cause of action in itself and that to give effect to the exculpatory provisions of the pass would violate public policy. Upon remand to the circuit court, the plaintiff was granted a judgment on the pleadings on the question of liability. After judgment was entered on a jury verdict assessing damages for plaintiff's personal injuries, the defendant appealed and the appellate court affirmed.

The defendant renews its argument that a violation of the Federal Safety Appliance Act calls only for criminal penalties and that a violation of the Act does not in itself create a cause of action. Hence, the defendant says, since the plaintiff has not alleged any negligence on the part of the defendant but only a violation of the Act, he has not

stated a cause of action. We hold that the plaintiff has stated a cause of action.

In construing the Federal Safety Appliance Act, as with other Federal Statutes, we must look to the Federal decisions for its interpretation. (*United States* v. *Gilbert Associates*, 345 U. S. 361, 363, 97 L. Ed. 1071, 1075; *Bowman* v. *Illinois Central Railroad Co.*, 11 Ill. 2d 186, 199; *Elgin, Joliet and Eastern Railway Co.* v. *Industrial Com.*, 9 Ill. 2d 505, 507; and *Luken* v. *Lake Shore and Michigan Southern Railway Co.*, 248 Ill. 377, 383.) An examination of the decisions interpreting the Act leads unmistakably to the conclusion that the Act provides a basis for a civil recovery.

In *O'Donnell* v. *Elgin, Joliet and Eastern Railway Co.*, 338 U. S. 384, 94 L. Ed. 187, the Supreme Court succinctly stated at page 390: "this Court early swept all issues of negligence out of cases under the Safety Appliance Act. For reasons set forth at length in our books, the Court held that a failure of equipment to perform as required by the Safety Appliance Act *is in itself an actionable wrong*, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence. *St. Louis and Iron Mountain & S. R. Co.* v. *Taylor*, 210 U. S. 281, 294, 52 L. Ed. 1061, 1067, 28 S. Ct. 616; *Chicago B. & Q. R. Co.* v. *United States, supra* (220 U. S. 575-577, 55 L. Ed. 588, 589, 31 S. Ct. 612); *Delk* v. *St. Louis & San Fran. R. Co.*, 220 U. S. 580, 55 L. Ed. 590, 31 S. Ct. 617." (Emphasis ours.) In *Affolder* v. *New York, Chicago and St. Louis Railroad Co.*, 339 U. S. 96, 99, 94 L. Ed. 683, 688, the court reiterated its holding in *O'Donnell*: "'a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong * * *.'" The same court in *Carter* v. *Atlanta and Saint Andrews Bay Railway Co.*, 338 U. S. 430, 434, 94 L. Ed. 236, 241, declared: "Once the violation [of the Safety Appliance Act] is established,

only causal relation is in issue." In *Shields* v. *Atlantic Coast Line Railroad Co.*, 350 U. S. 318, 325, 100 L. Ed. 364, 370, the Supreme Court said of the plaintiff therein: "he was a member of one class for whose benefit that device is a safety appliance under the statute. As to him, the violation of the statute must therefore result in absolute liability." The Court of Appeals for the 8th circuit in *Byler* v. *Wabash R. R. Co.*, (8th cir.) 196 F. 2d 9, at page 11, stated that: "Where liability for injury on the part of a common carrier engaged in interstate commerce is predicated on its failure to comply with the requirements of the Safety Appliance Act, it is not necessary to allege or prove negligence on behalf of the carrier other than failure to comply with the Act." Thus, it is apparent that a breach of the Safety Appliance Act does give rise to a civil cause of action which is separate from any cause of action based on negligence and that absolute liability for such breach is imposed on the violator.

It is, however, settled that the cause of action arising from a breach of the Act is not a Federal cause of action and consequently one in whose favor such a cause of action has arisen must look to the State courts to implement his right of action. *Tipton* v. *Atchison, Topeka & Santa Fe Railway Co.*, 298 U. S. 141, 80 L. Ed. 1091, and *Jacobson* v. *New York, New Haven & Hartford Railroad Co.*, (1st cir.) 206 F. 2d 153.

The Federal Safety Appliance Act is as much a part of the law and policy of the States as are their own laws enacted by the State legislatures. (See: *King* v. *New York, Chicago and St. Louis Railroad Co.*, 6 Ohio App. 2d 123, 216 N. E. 2d 900, 903; *Jacobson* v. *New York, New Haven & Hartford Railroad Co.*, (1st cir.) 206 F. 2d 153, 158.) Further, it is not unusual to allow a plaintiff to found a civil cause of action on a breach of a penal statute. *Dann* v. *Studebaker-Packard Corp.*, (6th cir.) 288 F. 2d 201, re-

ferred, at page 208, to "the long established general rule that a breach of statutory duty normally gives rise to a right of action on behalf of the injured persons for whose benefit the statute was enacted." This court in *Heimgaertner* v. *Benjamin Electric Manufacturing Co.*, 6 Ill. 2d 152, at page 155, declared: "When a statute is enacted for the protection of a particular class of individuals, a violation of its terms may result in civil as well as criminal liability, even though the former remedy is not mentioned specifically therein." See also *Ney* v. *Yellow Cab Co.*, 2 Ill. 2d 74; Restatement of Torts, 2d, § 286.

Congress, in its regulation of interstate commerce, has merely substituted a statutory duty for the railroad's common-law duty to maintain and provide safety appliances on their cars and has imposed absolute liability for its breach. (*Shields* v. *Atlantic Coast Line Railroad Co.*, 350 U. S. 318, 322, 323, 100 L. Ed. 364, 368, 369.) A plaintiff, therefore, may bring an action in an appropriate State court for injuries sustained because of a violation of the standard of conduct set forth in the Federal Safety Appliance Act. All that is necessary for a plaintiff to base his cause of action on a breach of this statute is that it appears that he was within the class of persons the statute intended to protect and that the injury was the type of risk covered. See Prosser on Torts, (2d ed.) chap. 5.

In enacting the Safety Appliance Act, Congress was actuated by the appalling frequency and seriousness of injuries suffered by railroad employees, including those who were required to work between cars in coupling operations. (*United States* v. *Seaboard Air Line Railroad Co.*, 361 U. S. 78, 82, 83, 4 L. Ed. 2d 25, 28, 29.) However, to limit the protection of the Act to railroad employees or those acting as employees, as the defendant urges, would be improperly restrictive and contrary to the congressional in-

tent. The title of the Act itself indicates that it is for the "protection of employees and travelers." (45 U. S. C. § 1). The Supreme Court in *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, 522, 523, 93 L. Ed. 208, 210, said: "This Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances." The Court of Appeals for the First Circuit in *Jacobson* v. *New York, New Haven & Hartford Railroad Co.*, 206 F. 2d 153, 155, 156, also declared: "It is true, as the Supreme Court has many times pointed out, that the classes of persons for whose protection the Safety Appliance Acts were passed include more than railroad employees, engaged in interstate commerce, as defined, who are given federal statutory rights of action by the Employers' Liability Acts * * * Compliance with the acts would also tend to protect passengers, such as plaintiff's intestate in the case at bar." The Act was intended to secure the safe operation of interstate trains by railroads. We have no doubt that passengers were certainly intended to be within the class to be protected under the Act.

The defendant next argues that the exculpatory provisions in the pass issued to plaintiff, pursuant to the Hepburn Act, 49 U. S. C. A. § 1(7), stating that the defendant assumed "all risk of accident and damage to person * * * in any circumstances, whether caused by the negligence of servants or otherwise", provide an affirmative defense to the claim of liability for plaintiff's injuries.

Again, in construing the Hepburn Act and the validity of exculpatory provisions in free passes issued pursuant to the Act, we are bound by Federal law (*Francis* v. *Southern Pacific Co.*, 333 U. S. 445, 92 L. Ed. 798; *Kansas City Southern Railway Co.* v. *Van Zant*, 260 U. S. 459, 67 L. Ed. 348.) Exculpatory provisions relating to negligence by

the railroad have been held valid. (*Francis* v. *Southern Pacific Co.*, 333 U. S. 445, 92 L. Ed. 798; *Richards* v. *Atchison, Topeka & Santa Fe Railroad Co.*, 226 F. Supp. 812.) But these provisions will not be enforced to exempt a carrier from liability for wanton and wilful negligence, as to do so would be contrary to public policy. *New York Central Railroad Co.* v. *Mohney*, 252 U. S. 152, 64 L. Ed. 502; *Martin* v. *Greyhound Corp.* (6th Cir.), 227 F. 2d 501.

While we would be bound by Federal law in interpreting the exculpatory provisions of the pass here, there is apparently no decision determining whether an exculpatory stipulation in a free pass will be given effect so as to exempt a carrier from liability to a passenger for injuries sustained because of a breach of the Safety Appliance Act. (See: 96 A. L. R. 2d 406.) We are, however, of the opinion that effect cannot be given to the provisions of the pass in the present case.

As the appellate court stated in its opinion, it is clear that the Federal Safety Appliance Act expresses the policy of the United States that the railroad's duty to equip and maintain its cars with secure and efficient couplers is absolute. Under such a policy which imposes an absolute duty to provide for public safety it would be incongruous to allow the doctrine of assumption of risk to be employed by the defendant to avoid this responsibility to one for whose benefit the statute was enacted. Here the plaintiff was within the class intended to be protected by the statute and the risk was the one contemplated, *viz.*, injury from a sudden stopping of the train. Under these circumstances and in view of the absolute standard imposed by the Act, we deem that to enforce the exculpatory provisions of the pass would subvert the purpose of the Act and defeat the public interest. See: *United States* v. *United States Cartridge*

Co. (8th Cir.), 198 F. 2d 456, 464; *Foreman* v. *Holsman*, 10 Ill. 2d 551, 554; *School District* v. *Teachers Retirement Fund Ass'n.*, 163 Ore. 103, 95 P. 2d 720, 723.

The judgment of the Appellate Court, First District, is affirmed.

Judgment affirmed.

MR. JUSTICE KLUCZYNSKI took no part in the consideration or decision of this case.

APPENDIX D.

Hepburn Act, 49 U. S. C. 1(7).

"Free transportation for passengers prohibited; exceptions; penalty. No common carrier subject to the provisions of this chapter, shall, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees, its officers, time inspectors, surgeons, physicians, and attorneys at law, and the families of any of the foregoing; to the executive officers, general chairmen, and counsel of employees' organizations when such organizations are authorized and designated to represent employees in accordance with the provisions of the Railway Labor Act; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of livestock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail-service employees and persons in charge of the mails when on duty and traveling to and from duty, and all duly accredited agents and officers of the Post Office Department and the Railway Mail Service and post-office inspectors while traveling on official business, upon the exhibition

of their credentials; to customs inspectors, and immigration officers; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons . . . Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than $100 nor more than $2,000, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty."

APPENDIX E.

Safety Appliance Acts, 45 U. S. C. 2 (Automatic Couplers).

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

APPENDIX F.

45 U. S. C. 6. (Failure to equip cars as provided; duty of United States Attorneys and Interstate Commerce Commission; exceptions from operation of provisions.)

Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of sections 1-7 of this title, shall be liable to a penalty of $250 for each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such United States attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper United States attorneys information of any such violations as may come to its knowledge: *Provided,* That nothing in sections 1-7 of this title shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such a car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotive used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. As amended Aug. 14, 1957, Pub. L. 85-135, § 1(1), 71 Stat. 352.

SUPREME COURT, U. S.

JAN 24 1968

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No. 967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Petitioner,

vs.

EVERD S. BOYER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether a breach of the Federal Safety Appliance Act (45 USC, Sec. 2) gives rise to a state civil action for compensatory damages in favor of an injured passenger?

2. Whether an interstate traveler riding on a free pass is included within the protective ambit of the Federal Safety Appliance Act?

3. Whether the public policy of Illinois in refusing to enforce an exculpatory provision in a free interstate pass is offensive in any way to the Hepburn Act (49 USC sec. 1(7)).

STATUTES INVOLVED

The statutory provisions are correctly cited in the petition.

ARGUMENT

The opinion of the Illinois Supreme Court is in complete harmony with numerous decisions and pronouncements of this Court relative to the Federal Safety Appliance Acts and the Hepburn Act, and presents no novel or monumental question deserving of review here. The decision below, in logical fashion, merely extends the absolute protection of the Safety Appliance Act enjoyed by railroad ticket passengers to travelers on free passes notwithstanding a purported exculpation of liability from negligence.

I.

The opinion of the Supreme Court of Illinois construing the Federal Safety Appliance Act is correct.

After the 1949 decision of this Court in *O'Donnell* v. *Elgin, J & E RR. Co.*, 338 U.S. 384, the question of an interstate carrier's strict liability for civil damages for a breach of the Safety Appliance Act (45 USC secs. 1, et seq.) is no longer debatable. A violation of that statute with resultant injuries, is in itself an actionable wrong, not predicated upon negligence and imposes absolute liability on the railroad—a liability which it cannot escape by proof of care or diligence, however assiduous. (*O'Donnell* v. *Elgin, J&E RR. Co.*, 338 U.S. 384, 389-390; *Brady* v. *Terminal Railroad Assn.*, 303 U.S. 10, 15).

While the series of Federal Safety Appliance Acts are penal in character, it was held even earlier than the *O'Donnell* case that these are also "remedial" statutes, and that for a failure of railroad equipment to function in accordance with the standard, and mandate of those

statutes, there arises a "liability to make compensation to one who is injured by it" (*CB&Q R. Co.* v. *United States;* 220 U.S. 559, 575 (1911); *St. Louis & Iron Mountain R. Co.* v. *Taylor,* 210 U.S. 281, 297 (1908). This court has also recognized that "liability to private suit is or may be as potent a deterrent as liability to public prosecution" under the Federal Safety Appliance Acts, (*Texas & Pac. Ry. Co.* v. *Rigsby,* 241 U.S. 33, 41), and thus has sanctioned the principle that a breach of a penal statute gives rise to a civil remedy.

Petitioner argues *ad terrorem* in asserting that the Illinois courts holding in *Boyer* "would expand the original jurisdiction of the Federal courts" on the theory that actions could be predicated on a breach of the Federal Safety Appliance Acts. (Pet. 7-8). Petitioner cites *Jacobson* v. *New York, N.H.&H. R. Co.,* 206 F. 2d 153 (1st Cir., 1953), and *Urie* v. *Thompson,* 337 U.S. 163, 189 (1948). The short answer is that the Illinois Court recognized only that a *state* cause of action arises from the breach of the Federal statute, not necessarily a federal cause of action "and consequently one in whose favor such cause of action has arisen must look to the State courts to implement his right of action." (38 Ill. 2d 31, 36 (1967)). The *Jacobson* case cited by petitioner, as well as the Illinois high court, notes that (206 F.2d 153 at 155) "in terms at least the Safety Appliance Acts confer no right of action for damages" [as the Federal Employers' Liability Act expressly does] *but observes that a breach of the Safety Appliance Acts can be the basis for a common law suit.* Since FELA expressly confers a right of action in favor of railroad employees, federal jurisdiction independently of diversity exists, but a breach of the Safety Appliance Acts was held *not* to raise a federal question

to support the district court's jurisdiction. Further, the court in *Jacobson* refused to extend the protection of the Safety Appliance Acts to an *intra state* passenger.

Urie v. *Thompson,* 337 U.S. 163, cited by petitioner, involved the construction of the Statute of Limitations under FELA, and holds only that silicosis claimed to have been contacted by the plaintiff, a former fireman, was within the coverage of that statute.

Nothing in *Urie* is in conflict with the later holding in *O'Donnell* that the duty imposed by the Safety Appliance Acts for the safe operation of specific railroad equipment is an "absolute one" and actionable without resort to negligence concepts.

The Illinois Supreme Court declares "that the Federal Safety Appliance Act is as much a part of the law and policy of the States as are their own laws enacted by the State Legislatures." (38 Ill. 2d 31, 36). Hence, *Boyer* is hardly a precedent for expanding the original jurisdiction of Federal District Courts and the latter question does not even arise in the instant case.

II.

Passengers, as well as railroad employees, are protected by the Safety Appliance Acts.

Contrary to contentions of petitioner, a cause of action for a breach of the Safety Appliance Acts accrues to members of the traveling public as well as to railroad employees. Not only does the title of the original Safety Appliance Act explicity denominate it as a statute "to protect the safety of employees *and travelers* upon rail-

roads'"* but pronouncements of this Court recognized a much broader protection of the Act than argued for by petitioner. Thus, in *Coray* v. *Southern Pacific Co.*, 335 U.S. 520, Mr. Justice Black, speaking for the Court said, at p. 522:

> "And this Act fairly interpreted, must be held to protect *all who need protection* from dangerous results due to maintenance or operation of Congressionally prohibited defective appliances." (Emphasis added).

In a series of cases involving *non-employees,* this Court unhesitatingly applied the protection of the Safety Appliance Acts; *viz. Brady* v. *Terminal R. Assn.*, 303 U.S. 10 (plaintiff not an employee of the defendant); *Shields* v. *Atlantic Coast Line R.*, 350 U.S. 318 (plaintiff an employee of an independent contractor); *Baltimore & Ohio R. Co.* v. *Jackson,* 353 U.S. 325 (dictum that Safety Appliance Acts extending to "the public"); *United States* v. *Seaboard ALR Co.*, 361 U.S. 78, 82, (protection "to those who ride the trains, particularly the men who operate them.") to the same effect *Fairport P & E R. Co.* v. *Meredith,* 292 U.S. 589, 594; *United States* v. *California,* 297 U.S. 175, 185; *Lilly* v. *Grand Trunk & Western R. Co.*, 317 U.S. 476, 486. The lower courts, as well, have declared that the benefits of the Safety Appliance Acts are not restricted to railroad crewmen, but extend to the public. *Jacobson* v. *N.Y., N.H. & H. Ry.*, 206 F. 2d 153, 155 (1st Cir.); *Barney* v. *Staten Island R.T.R. Co.*, 316 F. 2d 38, 40 (2nd Cir. 1965); *Lunsford* v. *L.&N. R. Co.*, 115 S.E. 2d 310, 311 Tenn.).

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* Title to Chap. 45 U.S.C., which contain the Safety Appliance Acts reads as follows: "CHAPTER ONE—SAFETY APPLIANCES AND EQUIPMENT ON RAILROAD CARS AND PROTECTION OF EMPLOYEES AND TRAVELERS."

III.

The public policy of Illinois in refusing to enforce an exculpatory provision on a free interstate railroad pass is not offensive to the Hepburn Act.

Waiver provisions on a free pass issued pursuant to the Hepburn Act may be effective to exculpate a railroad from liability for "ordinary negligence". Where, however, the theory of liability is not predicated upon negligence, but upon a breach of an absolute duty imposed by statute, the provisions of the pass do not exonerate the defendant from injuries suffered by the railroad's violation of Section 2 of the Safety Appliance Act. Since, "the absolute duty imposed [by the Safety Appliance Acts] necessarily supersedes the common law duty" of the railroad (*Tipton* v. *Atchison, Topeka & Santa Fe Ry.*, 298 U.S. 141, 151) considerations of negligence are irrelevant and the effect of the waiver provisions of the instant pass cannot be analyzed in terms of the carrier's common law duty.

Nothing in the decisions of the courts below in *Boyer* offends the Hepburn Act in the slightest degree. That Act contains no provisions regarding the terms or conditions of free passes. It does not purport to define the nature of such passes or the validity of waivers of liability contained in them. Cases cited by petitioner, *Kansas City Southern R. Co.* v. *VanZant*, 260 U.S. 459; *Charleston & W. Car. Ry. Co.* v. *Thompson*, 234 U.S. 576, and *Frances* v. *Southern Pacific Co.*, 333 U.S. 445, concern only the validity of a waiver of liability where the railroad is charged with negligence, not where it is accused of a breach of an absolute duty under a Federal public safety statute.

Petitioner seems incapable of recognizing that culpability for a breach of an absolute safety standard is more serious than guilt of simple negligence and that therefore the consequences are different in respect to the waiver provisions on a free pass.

Since Congress made no distinction in the Safety Appliance Acts between fare-paying and gratuitous "travelers", the absolute, unqualified duty of a railroad to operate safe equipment extends alike to both types of riders. The same public policy which vitiates a waiver of liability for a breach of Safety Appliance Acts on a railroad ticket, operates as well to invalidate such an exculpation on a free pass. This is the plausible underlying rationale for the decision in *Boyer* by the Illinois court. Nothing more is involved than the extension to a pass holder of the railroad's absolute duty to a ticket holder. Hence, the court properly therefore applied the principle that "one may not by contract immunize himself from civil liability, where to do so would violate public policy." *Boyer* v. *A.T.&SF Ry. Co.*, 34 Ill. App. 2d 330, 336, citing *inter alia*, *Starr* v. *Great Northern R. Co.*, 67 Minn. 18.

IV.

The Illinois decisions are in accord with sound precedent.

Contrary to the contention of petitioner that the "decision below is in conflict with . . . decisions by the Supreme Court of the United States" (Pet. 9) it may be pointed out that the decisions of both the Illinois Supreme and Appellate Courts are completely consonant with established legal principles and rules. In a note in 96 A.L.R. 2d 406, entitled "Persons Other Than Employee Riding On Railroad On A Free Pass, As Entitled to Benefits Of Federal Safe-

ty Appliance Act", the editor, annotating, 34 Ill. App. 2d 330, observes at p. 407:

> "While no other case has been found in which this specific point was in issue, there can be little doubt as to the soundness of the decision reached, in view of the fact that it is but an application of specific facts of well established legal principles and rules."

CONCLUSION

In conclusion, it is respectfully submitted that the judgment of the Illinois Supreme Court, and the two Appellate Court decisions, are clearly correct. No new or important issue is presented. The application of numerous decisions of this Court in respect to the Safety Appliance Acts and the Hepburn Act were properly made by the Courts below and requires no further elucidation by this Court.

It is therefore respectfully submitted that the PETITION FOR WRIT OF CERTIORARI should be denied.

Respectfully submitted,

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